

U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

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In the Matter of JAMES E. JOHNSTON and U.S. POSTAL SERVICE,  
POST OFFICE, Greensburg, Pa.

*Docket No. 96-476; Submitted on the Record;  
Issued July 15, 1998*

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DECISION and ORDER

Before MICHAEL J. WALSH, WILLIE T.C. THOMAS,  
MICHAEL E. GROOM

The issue is whether the Office of Workers' Compensation Programs properly determined that appellant's request for reconsideration was untimely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not demonstrate clear evidence of error.

The Board has duly reviewed the case record and concludes that the Office properly determined that appellant's July 27, 1995 request for reconsideration was untimely filed and did not demonstrate clear evidence of error.

The present case was before the Board on prior appeal. By decision and order dated March 1, 1994, the Board found that the Office met its burden of proof to terminate appellant's compensation effective April 7, 1991. The Board found that the weight of the medical evidence rested with the November 15, 1990 report from Dr. Robert M. Yanchus, a Board-certified orthopedic surgeon, the impartial medical examiner, who stated that appellant's conditions from his accepted January 19, 1969 employment injury had resolved no later than November 15, 1990, that appellant no longer suffered from residuals related to his accepted conditions, and that appellant could return to light work and was capable of working eight hours per day. The Board found that Dr. Yanchus' opinion was based on a proper factual background and was sufficiently well rationalized, and was therefore entitled to special weight.<sup>1</sup>

In a letter received by the Board on April 26, 1994, appellant filed a petition for reconsideration of the Board's March 1, 1994 decision.

The Board denied appellant's petition for reconsideration on June 30, 1994, finding that it failed to establish any error of fact or law warranting further consideration.

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<sup>1</sup> Docket No. 93-549 (issued March 1, 1994).

On July 27, 1995 appellant, through his attorney, requested that the Office reconsider his case. The Office denied appellant's request for reconsideration on August 24, 1995 as untimely filed and as failing to establish clear evidence of error in the Office's prior decision.

Section 8128(a) of the Federal Employees' Compensation Act<sup>2</sup> does not entitle a claimant to a review of an Office decision as a matter of right.<sup>3</sup> This section, vesting the Office with discretionary authority to determine whether it will review an award for or against compensation, provides:

“The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may—

- (1) end, decrease, or increase the compensation awarded; or
- (2) award compensation previously refused or discontinued.”

The Office, through its regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a).<sup>4</sup> As one such limitation, the Office has stated that it will not review a decision denying or terminating a benefit unless the application for review is filed within one year of the date of that decision.<sup>5</sup> The Board has found that the imposition of this one-year time limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).<sup>6</sup>

The Office properly determined in this case that appellant failed to file a timely application for review. In implementing the one-year time limitation, the Office's procedures provide that the one-year time limitation period for requesting reconsideration begins on the date of the original Office decision. However, a right to reconsideration within one year accompanies any subsequent merit decision on the issues.<sup>7</sup> The last merit decision in this case was the Board's merit decision of March 1, 1994.<sup>8</sup> As appellant's application for reconsideration was not filed with the Office until July 27, 1995, it was untimely.

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<sup>2</sup> 5 U.S.C. § 8128(a).

<sup>3</sup> *Jesus D. Sanchez*, 41 ECAB 964 (1990); *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

<sup>4</sup> Thus, although it is a matter of discretion on the part of the Office whether to review an award for or against payment of compensation, the Office has stated that a claimant may obtain review of the merits of a claim by: (1) showing that the Office erroneously applied or interpreted a point of law; or (2) advancing a point of law or a fact not previously considered by the Office; or (3) submitting relevant and pertinent evidence not previously considered by the Office; *see* 20 C.F.R. § 10.138(b)(1).

<sup>5</sup> 20 C.F.R. § 10.138(b)(2).

<sup>6</sup> *See* cases cited *supra* note 3.

<sup>7</sup> *Larry L. Litton*, 44 ECAB 243 (1992).

<sup>8</sup> *See Valetta C. Coleman*, 48 ECAB \_\_\_\_ (Docket No. 95-431, issued February 27, 1997).

In those cases where a request for reconsideration is not timely filed, the Board has held however that the Office must nevertheless undertake a limited review of the case to determine whether there is clear evidence of error pursuant to the untimely request.<sup>9</sup> Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.<sup>10</sup>

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.<sup>11</sup> The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.<sup>12</sup> Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.<sup>13</sup> It is not enough merely to show that the evidence could be construed so as to produce a contrary conclusion.<sup>14</sup> This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.<sup>15</sup> To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.<sup>16</sup> The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.<sup>17</sup>

In support of his July 27, 1995 request for reconsideration, appellant submitted a March 14, 1995 report from Dr. Rodney G. Gordon, a specialist in orthopedic surgery, who stated:

"From history, it is apparent that [appellant's] back problem began on January 19, 1969. He was off work for two years at the time because of a back injury sustained by lifting mail. In my opinion, this has contributed to the present situation. Subsequent injuries to his back have also contributed. Age related

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<sup>9</sup> *Gregory Griffin*, 41 ECAB 186 (1989); *petition for recon. denied*, 41 ECAB 458 (1990).

<sup>10</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsideration*, Chapter 2-1602.3(b) (May 1991).

<sup>11</sup> *See Dean D. Beets*, 43 ECAB 1153 (1992).

<sup>12</sup> *See Leona N. Travis*, 43 ECAB 227 (1991).

<sup>13</sup> *See Jesus D. Sanchez*, *supra* note 3.

<sup>14</sup> *See Leona N. Travis*, *supra* note 12.

<sup>15</sup> *See Nelson T. Thompson*, 43 ECAB 919 (1992).

<sup>16</sup> *Leon D. Faidley, Jr.*, *supra* note 3.

<sup>17</sup> *Gregory Griffin*, *supra* note 9.

degenerative changes have additionally contributed to the present situation. Thus, in my opinion, several injuries, combined with age related degenerative change have led to the present situation. It is not possible to calculate exactly how much each of these have contributed to the present situation.”

In its August 24, 1995 decision, the Office found that Dr. Gordon’s medical report lacked probative value and that his opinion was not based on a complete review of the record, and was therefore insufficient to establish clear evidence of error. The Office reiterated that the weight of the medical evidence remained with Dr. Yanchus, the impartial medical examiner, who provided a well-rationalized opinion based on a complete and accurate history. The Office therefore denied appellant’s request for reconsideration because it was not received within the one-year time limit pursuant to 20 C.F.R. § 10.138(b)(2).

The Board finds that Dr. Gordon’s March 14, 1995 report is not sufficient to establish that the Office abused its discretion in denying appellant a merit review. Dr. Gordon’s conclusions are not sufficiently supported by findings or medical rationale to raise a substantial question as to the correctness of the denial of appellant’s claim and thus do not establish clear evidence of error regarding the denial of appellant’s claim. The allegations made by appellant’s attorney in support of his request for reconsideration reiterate arguments appellant had previously presented to the Office and Board and do not constitute the necessary clear evidence of error.

As appellant’s request for reconsideration was untimely filed and did not establish clear evidence of error, the Office properly denied appellant’s request for reconsideration.

The decision of the Office of Workers’ Compensation Programs dated August 24, 1995 is hereby affirmed.

Dated, Washington, D.C.  
July 15, 1998

Michael J. Walsh  
Chairman

Willie T.C. Thomas  
Alternate Member

Michael E. Groom  
Alternate Member